No. 01-1420

IN THE

Supreme Court of the United States

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, *et al.*,

Petitioners,

v.

GUARDIANSHIP ESTATE OF DANNY KEFFELER, by WANDA PIERCE, Guardian, and other persons similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF AMICI CURIAE: OMAR M. AZZAM, WILLIAM J. BETTENCOURT, KRYSTINA M. BETTENCOURT AND MISTIE NICOLE MABE, AND OTHER PERSONS SIMILARLY SITUATED, IN SUPPORT OF RESPONDENTS

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OPINION BELOW

In *Guardianship Estate of Danny Keffeler v. Washington State Department of Social and Health Services, et al.*, 145 Wash. 2d 1, 32 P.3d 267, the Washington Supreme Court

held that the State of Washington violated the anti-alienation provision of 42 U.S.C. § 407(a) by confiscating dependant children's Social Security benefits for the purpose of reimbursing itself the costs of providing foster care to children. According to the Washington Supreme Court, the State of Washington acts as a creditor of dependant children when reimbursing itself from said children's Title II or Title XVI Social Security benefits for foster care and other related services. The decision prevents State agencies from confiscating needy children's benefits to pay for services the agencies are legally obligated to provide.

The reasoning of the *Keffeler* decision is correct, and the decision should be affirmed.

INTEREST OF THE *AMICI CURIAE*

Amici children are class representatives of classes of dependant children who, since 1976, have had their Social Security benefits wrongfully converted by the California Counties of Los Angeles, Santa Clara, and San Bernardino in violation of 42 U.S.C. § 407(a). Each action was filed in early 2002 and was removed to the Federal District Court and stayed when *certiorari* was granted herein. Neither the size of the classes nor the extent of the Social Security benefits converted during this period is known as of this date, as no discovery has been conducted.[1]

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1. *Amici* herein have obtained consent of all parties to join in this *amicus* brief, pursuant to Rules of the Supreme Court of the United States, Rule 37.3. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae* and their counsel, has made a monetary contribution to the preparation and submission of this brief.

The California Counties *amici* brief asserts that children *amici* herein seek "repayment of millions of dollars of public funds expended for care of dependant children." (Brief of California Counties *amici*, at 4). In truth, children *amici* herein seek repayment of *the children's monies* taken from them by the California Counties in violation of 42 U.S.C. § 407(a). Further, while it is indeed true that class representatives seek damages under 42 U.S.C. § 1983, no particular county employees have been sued individually, and thus no individual faces liability for punitive damages.

Each of the thousands of children who are members of the subject classes has a strong interest in this Court's interpretation of the applicable provisions of the Social Security Act, and the prevention of further confiscation of their Social Security benefits. *Amici* children herein urge the Court to uphold the Washington Supreme Court's interpretation of the anti-alienation provision of 42 U.S.C. § 407(a).

SUMMARY OF ARGUMENT

While it is permissible for state agencies to act as representative payees of dependant children under section 405(j) of the Social Security Act, section 407(a) of the same Act prohibits such agencies, (acting as each child's fiduciary), from confiscating the children's Social Security benefits to reimburse themselves the cost of foster care services.

ARGUMENT

I

THE STATE ACTS AS A CREDITOR OF DEPENDANT CHILDREN IN REIMBURSING ITSELF FOR THE COSTS INCURRED IN THEIR CARE

In *Philpott v. Essex County Welfare Bd.* (1973) 409 U.S. 413, the United States Supreme Court described the broad protection that 42 U.S.C. § 407(a) affords Social Security benefits. *Philpott* declared that § 407(a) barred the State of New Jersey's attempt to reach Social Security disability benefits in order to reimburse the state for public assistance expenditures made on behalf of the petitioners. State welfare recipients were required to execute an agreement, as a condition to receiving welfare benefits, to reimburse the county welfare board with any funds that came into their possession.

When Philpott refused to turn over his SSA benefits to the board, the board sued to enforce the agreement. This Court held that § 407(a) prohibited New Jersey from reaching the petitioner's Social Security benefits, explaining, "We see no reason why a State, performing its statutory duty to take care of the needy, should be in a preferred position as compared with any other creditor." *Philpott*, 409 U.S. at 416.

In *Keffeler*, after reviewing the reimbursement practices of the Washington Department of Social & Health Services ("DSHS"), the Washington Supreme Court found that DSHS' practices "demonstrated a creditor relationship, a relationship involving creditor-type acts, vis-à-vis foster children and their SSA benefits". 145 Wash. 2d at p.18. The *Keffeler* Court

found that DSHS' status as representative payee did not change the analysis of its ability to use the Social Security benefits it received as reimbursement. The reason that the DSHS scheme rendered it a creditor can be found in Washington's statutes:

> RCW74.13.060 (and its implementing legislation, (former WAC 388-70-069) requires it to reimburse itself for the public assistance it has meted out to foster children from money, including SSA entitlements, that come into the children's possession. If the legislature did not hold the costs of foster care were somehow "owed" back to the taxpayers, it would not claim the right of DSHS to reimburse itself on the taxpayer's behalf.

145 Wash. 2d at pp.23, 25.

Thus, the key question in *Keffeler* is whether a state may comply with its fiduciary duty as representative payee to administer Social Security benefits in a *child's* best interests while simultaneously acting under state laws and regulations that require that it transfer to the state treasury all Social Security benefits received on behalf of a child in foster care without regard to the needs of the child. The Washington Supreme Court correctly held that it could not. By billing the children for the myriad costs associated with their foster care, and then applying their SSA and SSI benefits to recoup these costs, the DSHS acts as a creditor.

Even though it serves as representative payee, Washington's DSHS cannot take the children's Social Security monies to repay unspecified foster care costs. As the *Keffeler* Court put it, "if DSHS is allowed under

§ 405(j) to become a representative payee for the foster children, that fact does not establish the legality of taking the child's money." 145 Wash.2d at pp.22-23.

Like Washington law, California law requires that counties providing foster care seek reimbursement of the cost of such care from the children themselves. California Government Code § 27757(c) reads in pertinent part as follows:

> In any case where a county has expended money for the support and maintenance of any ward, dependant child or other minor person . . . if the ward, dependant child or other minor person or parent, guardian or other person liable for the support of the ward, dependant child or other minor person acquires property, money, or estate subsequent to the date the juvenile court assumed jurisdiction over the ward, dependant child or minor person, . . . the county shall have a claim for said reimbursement against the ward, dependant child or other minor person or parent, guardian or other person responsible for such support and maintenance. The county financial officer or the local child support agency shall enforce such claim, as the case may be.

Just as DSHS in Washington acted as a creditor in impermissibly recouping its foster care costs from dependant children's Social Security benefits, the *amici* California Counties act as creditors of dependant children under California Government Code § 27757(c). Using the Social Security benefits for the care and maintenance of the beneficiary, as required under 20 C.F.R. § 404.2035(a), would

indeed be in the best interests of the *beneficiary*. But that is significantly different from using such benefits to reimburse *the Counties* for the unspecified overall administrative costs generally incurred by the Counties.

Appellants and California Counties *amici* rely on *King v. Shafer* 940 F.2d 1182 (8th Cir. 1991) and *Mason v. Sybinski* 280 F.3d 788 (7th Cir.2002) for the proposition that use of Social Security benefits by government agencies to reimburse foster care costs does not violate the anti-alienation provision of Section 407(a). The *King* court, however, held only that an agency does not employ "other legal process" when it appoints itself as representative payee. The *King* court did not address or consider the specific issue of a representative payee acting in the capacity of creditor. Likewise, in *Mason*, the issue addressed and decided was whether it was "other legal process" to use Social Security benefits. Neither *King* nor *Mason* even addressed the creditor-debtor issue decided by the Washington Supreme Court in *Keffeler*.

It is true that state agencies may be appointed as representative payees under the Social Security Act. Such appointments are appropriate only if no other suitable individual is identified to serve in that capacity. (20 C.F.R. §§ 404.2021(b), 416.621(b)). However, the capacity of a state agency to serve as a child's representative payee does not give that agency *carte blanche* authority to confiscate all of that child's Social Security benefits without scrupulous consideration of that child's individual needs.

II

CONFISCATING A FOSTER CHILD'S BENEFITS IS "OTHER LEGAL PROCESS" WITHIN THE MEANING OF § 407(a)

Under the Social Security Act, a beneficiary's creditors are prohibited from attaching or encumbering Social Security benefits. 42 U.S.C. § 407(a) states:

> The right of any person to any future payment under this Subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law. 42 U.S.C. §§ 407(a), 1383(d)(1).

When a governmental agency takes a foster child's benefits as a "claim for reimbursement" pursuant to a statute such as California Government Code § 27757(c), (or Washington's RCW 74.13.060), such a taking is clearly "other legal process" and prohibited by § 407(a). In *Crawford v. Gould*, 56 F.3d 1162 (9th Cir. 1995), California's Health & Welfare Agency withdrew psychiatric patients' Social Security benefits without their consent to reimburse itself for the cost of the patients' care. The Ninth Circuit Court of Appeals noted that if California's procedure conflicts with the anti-alienation provision of § 407(a), the Supremacy Clause of the United States Constitution requires that the state procedure be set aside, citing *Bennett v. Arkansas*, (1988) 485 U.S. 395.

In holding that this procedure amounted to "other legal process", the Court noted:

> Our conclusion, that "other legal process" includes the procedure that California uses to deduct Social Security benefits, is consistent with the purpose of § 407. The nonassignment provision was not designed to preclude use of only the judicial process to obtain Social Security benefits. Rather, § 407(a) is designed "to protect Social Security beneficiaries and their dependants from the claims of creditors. . . . The cramped reading of § 407 California urges would enable the state to obtain Social Security benefits through procedures that afford less protection than judicial process affords.

Crawford, supra, 1166 (citations omitted). The *Crawford* Court concluded that the clause "other legal process" is not limited to court-initiated enforcement proceedings:

> Congress intended the words 'or other legal process' to embrace not only the use of formal legal machinery but also resort to express or implied threats and sanctions. . . . Thus § 407(a) is violated when the state places itself in the position of a preferred creditor or coerces payment from protected beneficiaries.

Id. at 1167, citing *Fetterusso v. New York*, 898 F.2d 322, at 328. (2d Cir. 1990)

The essence of the Ninth Circuit's holding in *Crawford* was aptly summarized by Justice Trott in his concurring opinion:

> If the patient-debtor were not under the absolute control of the state, a process such as execution, levy, attachment, garnishment, or some "other legal process," would be needed to get at his funds. But, because in this instance the state controls both the patient and his money, the state need not resort to such devices, as this case demonstrates. Under these circumstances, permitting the state to say, as it does, that taking money from people who don't want to give it up is not "legal process" sounds too much like a construction out of Bleak House, or the parchment stuff of Dick the Butcher in Henry the Sixth, Part 2. The end ultimately may be palatable, but the state's recommended manner of achieving it is not.

Id at 1169.

Amici children are, like the mental patients in *Crawford*, "under the absolute control of the state" which controls both the children and their money. Can it realistically be said that California's (or Washington's) practice, done without any resort to judicial intervention, is not "other legal process"? Clearly it is.

III

THERE IS NO IMPLIED EXCEPTION TO § 407(a) FOR THE ATTACHMENT OF SOCIAL SECURITY BENEFITS

The Washington statute (RCW 74.13.060), and California Government Code § 27757(c), authorize the social service agencies of both states to take custody of a foster child's Social Security benefits. Each statute subjects a child's Social Security benefits to a legal administrative process akin to legal judicial process, which is forbidden by § 407(a). Appellants urge that their confiscation of Social Security benefits is an exception to § 407(a).

However, this Court has already held there are no such exceptions. In *Bennett v. Arkansas*, (1988) 485 U.S. 395, an Arkansas statute (Arkansas Stat. Ann. § 46-1704(a) (Supp. 1985)) provided that the estate of a person incarcerated in a penal facility of the Arkansas Department of Corrections "may be subjected to the payment to the State of the expenses paid and to be paid by it on behalf of said person as a prisoner." Arkansas Stat. Ann § 46-1702(b) (Supp. 1985) defined "estate" as:

> . . . any properties, tangible or intangible, real or personal, belonging to or due an inmate confined to an institution of the Department of Correction, including income or payments to such inmate from Social Security, previously earned salary or wages, bonuses, annuities, pensions or retirement benefits, or from any source whatsoever.

485 U.S. 395, 396 n.1.

The Arkansas Supreme Court, in rejecting the prisoners' challenge that the law violated § 407(a), (290 Ark. 47, 716 S.W. 2d 755 (1986) found that there was no conflict between the federal and state statutes because "the federal statutes contain an implied exception to the exemption from legal process when the State provides for the care and maintenance of a beneficiary of social security or veterans' funds." *Id.* at p.49.

In reversing the Arkansas Supreme Court, this Court found a clear inconsistency between the Arkansas statute and 42 U.S.C. § 407(a).

> Section 407(a) unambiguously rules out any attempt to attach Social Security benefits. The Arkansas Statute just as unambiguously allows the State to attach those benefits. As we see it, this amounts to a 'conflict' under the Supremacy Clause-a conflict that the State cannot win.

485 U.S. 395, 397.

This Court has determined that § 407(a) is unambiguous and contains no implied exception for legal process that would allow for attachment of otherwise exempted federal benefits "simply because the State has provided the recipient with 'care and maintenance'." 485 U.S. at p.397. There exists no compelling reason why the result should be any different for foster children. As the trial judge noted in *Keffeler*, "[T]here is no legal basis for giving foster children less protection for their social security benefits than adult welfare recipients, state prisoners, or involuntarily committed mental patients receive." *Estate of Keffeler, supra*, 145 Wash. 2d 1 at 22.

Appellants point to *C.G.A. v. State*, (1992) 824 P.2d 1364 as authority for the proposition that the State may use a minor's Social Security benefits to pay for the cost of his incarceration at juvenile hall. However, the *C.G.A.* court only said that the state may apply to become a representative payee. *C.G.A.*, 824 P.2d at 1366. As the Washington Supreme Court noted in *Keffeler*, "The court did not hold the state could reimburse itself but deferred that determination to the Social Security agency under the doctrine of primary jurisdiction. Id at p.1370." *C.G.A.* stands for no more than the uncontested proposition DSHS may apply to become a representative payee. 145 Wash. 2d 1, at 22.

IV

CONFISCATING A DEPENDANT CHILD'S SOCIAL SECURITY BENEFITS RESULTS IN INDIGENCY

Under federal law, if the monthly Social Security benefit due a dependant child exceeds the amount needed for his or her current maintenance, Social Security regulations direct the representative payee to conserve or invest the excess funds and hold them in trust for the child. (20 C.F.R. § 404.2045(a), 416.645(a)). A child receiving Supplemental Security income under Title XVI of the Act (42 U.S.C. § 1381 *et seq.*) may accumulate no more than $2,000 in his or her account. (20 C.F.R. §§ 404.2045(a), 416.645(a)). However, a child receiving Old Age and Survivors Disability Insurance Benefits under Title II of the Act, (42 U.S.C. § 401 *et seq.*) is not limited in the amount that may accrue in his or her account.

SSA (42 U.S.C. § 401 *et seq.*) is an insurance program. A child receives benefits when a parent dies or is disabled

until the child is eighteen, without regard to the child's resources. Congress intended these benefits "to provide persons dependant on the wage earner with protection against the economic hardship occasioned by loss of the wage earner's support." *Califano v. Jobst.*, (1977) 434 U.S. 47, 50.

SSA benefits end when the child reaches age 18. Under California Law, Juvenile Court dependency jurisdiction over a child is terminated when the child reaches the age of 18 (California W&I Code § 300 *et seq.*). Under the current situation, due to the diversion of their Social Security benefits prior to their aging out of the system, dependant children under both systems are left indigent when they reach 18.

As an example, Mistie Mabe, the class representative in the pending class action against the County of San Bernardino (Case No. ED CV 02-208 RT [SGLx]), was receiving benefits of $815 per month due to the death of her father when she was 10. At that time, her mother was using approximately $600 for her use and benefit and depositing approximately $215 a month into a savings account for her benefit as required by the Social Security Act. Mistie was removed from her mother's home in June of 1995, and declared a dependant of the Juvenile Court in August. Her warrantless removal was later found by the Ninth Circuit Court of Appeals to be in violation of the 4th Amendment, as she was not in "imminent danger of serious bodily injury" when removed.[2] She remained in the foster care system for 44 months.

When she turned 18 in March of 1999, Ms. Mabe was simultaneously aged out of both the foster care system and

2. *Mabe v. County of San Bernardino*, 237 F.3d 1101 (9th Cir. 2000).

her entitlement to survivor's benefits under Title II of the Social Security Act. Although her mother (her representative payee before her detention in foster care), had accumulated Social Security funds in her savings account prior to her detention in foster care, the County of San Bernardino failed to do so, so that at age 18 she was left with *no accumulated savings whatsoever for the time the County was her representative payee.*

No accounting was ever provided Ms. Mabe, who was simply told there were no funds accumulated on her behalf. At the exact time in her life when her representative payee was required to transfer any accumulated funds to her that would allow her to attend college, marry, or start a business, she was left penniless. Thus, the confiscation of her benefits caused the very problem (indigency) that Title II of the Social Security Act was designed to prevent. There exists no justification for the Counties of California to balance their books on the backs of dependant children that temporarily come under their care.

V

CALIFORNIA DOES NOT USE BENEFITS WITHHELD FROM CHILDREN FOR THEIR CURRENT MAINTENANCE

SSI (42 U.S.C. § 1381 *et seq.*) is a welfare benefit, based on either the child's or a parent's disability. Benefits are provided "to assure a minimum level of income for persons who are ". . . blind or disabled and who do not have sufficient income and resources to maintain a standard of living at the established Federal income level." 20 C.F.R. § 416.110. The Social Security Administration regulations authorize a

representative payee to pay for the beneficiary's "current maintenance", including the costs of "food, shelter, clothing, medical care and personal comfort items." 20 C.F.R. §§ 404.2040(a), 414.640(a).

When the monthly Social Security benefits exceed the amount needed for current maintenance, the regulations direct the representative payee to *conserve* or *invest* these funds and hold them in trust for the child. 20 C.F.R. §§ 404.2045(a), 416.645(a). This is a part of the overriding requirement that Social Security benefits be used in the *beneficiaries'* "best interest". 42 U.S.C. § 405(j).

Amici William J. Bettencourt and Krystina M. Bettencourt are class representatives in the class action now pending against the County of Santa Clara in the Northern District of the United States District Court in California, case no. C 02-01712 (JF). Each, along with two siblings, began collecting SSI benefits due to the disability of their mother in 1993. All four children were removed from their mother's custody on August 27, 1998, and the County of Santa Clara thereafter became their representative payee, and remains so at present. In November of 2001, William was returned to his mother's custody, and Krystina was returned in February of 2002. One sibling remains in foster care, and, after his mother's parental rights were terminated, another sibling was adopted in 2000.

Despite the fact that three of the children are no longer in its care, the County of Santa Clara continues to withhold their current Social Security monthly benefits to reimburse itself for foster care benefits paid *as long ago as 2000*. It cannot be rationally argued that William, Krystina or their adopted brother's "current maintenance" entitles the County

of Santa Clara to withhold their benefits – or that such action is in their best interests – *as none of them is currently receiving foster care benefits*. Their mother, however, remains disabled, and in need of the children's Social Security benefits to meet their current needs.

The plight of these children demonstrates that the California Counties are taking children's social security benefits for the purpose of revenue recovery, and not for providing for the children's "current maintenance." It was precisely this type of conduct which the Washington Supreme court struck down in *Keffeler*, as the Court held that using the Social Security benefits to reimburse the State for its public assistance expenditures is not, in all cases or even some, "in the best interests of the beneficiary":

> ". . . especially when that payment to the State cannot be legally compelled, and, moreover, could be used or conserved for other special needs of the child."

145 Wash.2d at p.24.

It defies logic to contend that depriving William and Krystina Bettencourt of their *current* benefits to repay the County of Santa Clara for the cost of their *past* foster care is providing for the children's "current maintenance" within the meaning of the Social Security regulations. Yet that is the intended effect of California Counties' confiscatory policy.

The Bettencourt children would be better off with any representative payee other than the County of Santa Clara

because the County cannot compel a private representative payee to repay its foster care expenditures. As the *Keffeler* Court held:

> Simply put, if DSHS is appointed representative payee for a foster child it will confiscate the child's SSI money to benefit the state. However, if *anyone else* is appointed, the state will bear the cost of foster care, and the child's SSI will be available to benefit the child in addition to the state-funded foster care program.

145 Wash.2d at p.16.

In the Bettencourt case, although the children's mother cannot be compelled to reimburse the State for the children's past foster care expenses, the County of Santa Clara continues to confiscate the children's benefits. This deplorable situation clearly illustrates how the actions of California's *Amici* Counties are not in the best interests of the children, are those of a predatory creditor, and violate the anti-alienation provision of 42 U.S. C. § 407(a).

Further evidence that California Counties are not using the children's funds to provide current maintenance is the fact that for many children, these very expenses have already been recovered, in part, from federal funds or the children's parents. As the brief of California Counties *amici* admits, the federal government pays at least 50 percent of foster care. (Brief of California Counties *amici* at 6) And the Social Security Act itself requires states to seek financial support from the parents of children in foster care in order to qualify for federal child welfare funding. (42 U.S.C. § 654) Thus,

California Counties are likely to recover their costs twice when they repay foster care expenditures from a child's subsidiary account already recovered from these sources.

The use of the children's Social Security benefits to pay overall program administrative costs, past due expenses, and for costs and services already paid for by federal funds or child support payments violates § 405(j)'s "use and benefit" requirement and serves no interest, much less the best interest, of the child.

CONCLUSION

The *Keffeler* court correctly concluded that the actions of DSHS in assuming the position of a creditor to foster children in its care violated the "broad bar" of § 407(a) of the Social Security Act. A public agency cannot simultaneously wear the hats of creditor and representative payee. No harm will come to state agencies if *Keffeler* is affirmed. However, there will be immense benefit to the children upon whom Congress conferred these precious Social Security entitlements. *Amici* children respectfully request that the Court affirm the decision of the Washington Supreme Court and thereby protect the interests of individual children in Washington, California and throughout the Country.

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